THE RIGHT OF THE JURY TO REVIEW THE DECISIONS OF THE COURT UPON THE ADMISSIBILITY OF EVIDENCE AS ILLUSTRATED IN THE LAW OF DYING DECLARATIONS

IN the discussion of this question, it is thought that the present condition of the law can be made most satisfactorily to appear by gathering the declarations of various courts found in illustrative opinions, and a good portion of this article will attempt this collection. Where the courts of particular states have not spoken upon this particular question, and cases illustrating the principle as applied to confessions exist, they have been used. And in a few instances cases involving the law of the admissibility of confessions have been used, though there were cases involving dying declarations, because they were more representative of the views of the court, by reason of the particular way in which the question arose and was considered.

The declarations of a person since deceased have long been regarded as admissible, under certain limitations, now well defined, notwithstanding their contravention of the rule against hearsay. These limitations are: (a)the case in which they are offered must be a prosecution for the death of the declarant; (b) the declaration must have reference to the circumstances resulting in the death, and tend to show how or by whom it was accomplished; (c) it must be shown that the declarant was at the point of death and that his death actually followed as the result, in some measure at least, of conditions then existing; (d) it must be made to appear that the declarant, at the time he made the declaration, had no hope that he would recover from the injury, and that he believed his death was then imminent.

These limitations raise questions of admissibility which it is the purpose of this paper to discuss. The particular question I would suggest is, should the jury pass upon, and finally determine, the admissibility of such declarations? Probably no one would suggest that the first limitation, that the case in which the declaration is offered must be that in which the death of the declarant is being investigated, raises any question which should go to the jury.

It is so apparent that the judge should finally determine the character and object of the proceeding which he directs and controls that no one would think of suggesting that the jury should be permitted to revise his conclusion on this question.

So as to the second limitation upon admissibility: it is not often that the testimony would disclose troublesome questions as to whether a particular declaration had reference to the circumstances resulting in the death of declarant and tended to show how or by whom it was accomplished. But it cannot be said that there might not arise a case in which difficult questions of fact must be solved before declarations offered could be admitted, as against the objection that the language used did not have reference to the cause of declarant's death or the identity of his slayer.

As to the third limitation, that the declarant must be shown to have been, at the time of making the declaration, at the point of death and that death followed, due in some measure at least, to conditions then existing, not much difficulty would usually arise. But it is noticeable that if troublesome questions should grow out of this rule of limitation they are quite certain to be of the character commonly called questions of fact. The fourth limitation upon the admissibility of such declarations, that it must be made to appear that the death of the declarant was not only imminent, but that he was conscious that it was, and himself believed that he was about to die, very often raises questions of great difficulty.

The determination of one's mental condition, of what was his mental attitude at a particular time upon any particular question, is more than likely to be difficult of accurate ascertainment. And this difficulty is one of determining whether a particular fact, or as I have said, a particular mental condition, exists; for as has been said, "The state of a man's mind is as much a fact as the state of his digestion."

Our question then, stated in another form, is, for whose decision are these questions when they do arise? It is apparent at once that the principles involved are of much wider application than for the solution of these particular questions, but this paper will be confined to the narrower discussion indicated above.

The earliest reported cases seem to indicate that the practice was to leave all questions affecting admissibility to the trial judge who admitted or rejected the declaration according as he found the essentials of a dying declaration present or not. No reported case seems to have even suggested a different practice till we come to the report of *Woodcock's case* in 1787.[1] The report of this case, after giving in detail the discussion of the court of the circumstances

[1] Leach's Crown Law. 563.

under which the statements offered were made, concludes with this language:—

"Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence; but the degree of credit to which they are entitled must always be a matter for the sober consideration of the jury, under all the circumstances of the case. His lordship then left it with the jury to consider whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution, and said, that if they were of the opinion that she was, then the declarations were admissible, but that if they were of a contrary opinion they were not admissible."

Conviction and execution followed.

Three years later we have the case of *Thomas John*, prosecuted for the murder of his wife, reported by Buller J.[1] The admission of the declarations of the wife was dependent upon whether, at the time she made them, she believed her death to be imminent. It was insisted that the jury should be permitted to pass upon this question. The court declined to permit the jury to do so, and the prisoner being convicted the question was reserved for the judges, who as the report goes on to say:—

"At a conference in Easter term, 1790, all agreed that it ought not to be left to the jury to say, whether the deceased thought she was dying or not, for that must be decided by the judge before he receives the evidence."

The same question was in *Welbourn's case*[2] and the trial judge being in doubt, the question again went before all the judges and, as the report states,—

"They all agreed that whether the deceased thought herself in a dying state or not was matter to be decided by the judge in order to receive or reject the evidence, and that that point should not be left to the jury."

Lord Ellenborough is reported to have said in *Rex* v. *Hucks*,[3] which involved the question of the admission of a writing in a prosecution for forgery:—

"In this as in many other cases, the question is exclusively for the court; as for instance where a declaration has been made by a party in *articulo mortis*, whether under all the circumstances the declaration is admissible in evidence. This point was considered by the judges here on a question proposed to them by the judges in Ireland, who entertained doubts upon the subject, and this was their unanimous opinion."

This question of the admissibility of a dying declaration was submitted to the jury in *Campbell's case*.[4] It seems quite probable, however, though the data are not at hand to certainly determine the

[1] 1 East's Pleas of the Crown, 357 (1790).

[2] 1 East P. C. 360 (1792).

[3] 1 Stark. 521 (1816).

[4] R. *v.* Campbell, 1 Crawford & Dix, C. R. 150 (1803).

question, that this is the case referred to by Parke B., in *Bartlett* v. *Smith*[1] where he says:—

"All preliminary matters of this kind [admissibility of a bill of exchange] are to be determined by the judge, not by the jury. I well recollect the case of Major Campbell, who was indicted for murder in Ireland; and on a dying declaration being tendered in evidence, the judge left it to the jury to say whether the deceased knew, when he made it, that he was at the point of death. The question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges who returned for answer that the course taken was not the right one, and that the judge ought to have decided the question himself."

He adds that in a case before himself involving the same question of admissibility, he took the opinion of the judges to the same effect. The question seems to have been settled by the decisions referred to against the practice followed in *Woodcock's case*. The author of Roscoe's Criminal Evidence in speaking of the opinion in this last named case says:—

"It is scarcely necessary to say that the opinion expressed by Eyre, C. B., in R. *v.* Woodcock that the admissibility of a dying declaration is in some degree a question for the jury, is erroneous. It is for the judge alone."[2]

It may be noted in passing that *King* v. *Dingler*[3] is sometimes referred to as supporting the doctrine of *Woodcock's case*, but so much can scarcely be claimed for the case.[4]

An examination for the rule in this country upon this question will discover great confusion in the authorities, and much difficulty will be experienced in tracing the influences which have led to this condition.

The earliest case which has met my attention in which this precise question was before the court was in the supreme court of North Carolina in 1821.[5] The language of the court is:—

"The latest and most authoritative cases show that the court is to decide, and not the jury, whether the deceased made the declaration under the apprehension of death."[6]

This decision followed in point of time *Woodcock's*, *John's* and *Hucks'* cases but was earlier than the opinion in *Bartlett* v. *Smith*.

This question was before the supreme court of Virginia in *Hills' case*[7] where the court disposed of it by saying:—

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[1] 11 M. & W. 483 (1843).

[2] Roscoe's Crim. Ev. (8th Am. Ed.) 61.

[3] Leach, Crown Law, 638 (1791).

[4] See note to 11 Eng. Rul. Cas. 298.

[5] State *v.* Poll & Lavinia, 1 Hawks (N. C.) 442.

[6] Reference is made to 1 East's Pleas of the Crown 357, John's case, (1790).

[7] 2 Gratt. 594 (1845).

"The rule is now established, though for a time it was vibratory in the English courts, that the fact of the dying condition must be determined by the court and not the jury."

Three years later the supreme court of Tennessee in *Smith* v. *State*,[1] referring to the question of whether the declarations offered as dying declarations were made under such circumstances as that the jury was entitled to consider them, said:—

"And of this the trial judge is to determine alone, without the aid of the jury."

This case was followed in *Brakefield* v. *State*[2] a few years later. In *People* v. *Glenn*[3] the defendant requested the trial court to instruct the jury that if they thought the deceased was not likely to be impressed with a sense of his approaching dissolution they should disregard his dying declarations; that they were the sole judges of all the testimony and might give what credit they pleased to any part of it. This case went to the supreme court of the state on exception, among others, to the refusal to give the requested instruction. The point is disposed of in the opinion of the court in this language:—

"The refusal of the court below to submit the question of admissibility of the dying declarations of the deceased to the jury was no error."

In 1850 the case of *State* v. *Cameron*[4] came before the supreme court of Wisconsin with an exception to an instruction by the trial court:—

"That if deceased, at the time he made the declarations, was conscious that he could not survive, they were evidence for the jury to consider, but if he was not conscious of impending death, if he had then a hope of recovery, they must be excluded from the consideration of the jury."

The trial court had heard evidence upon this question and admitted the declaration and later other evidence bearing upon the condition of declarant was admitted to the jury. The court in reviewing the instruction says:—

"We think the charge of the court upon this subject was correct. The question of whether the declarations shall go to the jury, is one for the court to determine."[5]

The court seems not to have considered the question of whether it was competent for the jury to pass upon the question of admissibility, but only the question of whether the essentials of a dying declaration were properly regarded by the trial court. The only authority cited, *Hucks' Case*, is not, as previously pointed out,

[1] 9 Humph. 9, (1848.)
[2] 1 Sneed, (Tenn.) 214 (1853).
[3] 10 Cal. 33 (1858).
[4] 2 Pin. (Wis.) 490.
[5] Citing Hucks' case, 1 Stark. 521, (1816), 2 E. C. L. 198.

authority for the practice which would leave the determination of the question of admissibility to the jury.

In *Campbell's Case*,[1] decided two years later by the supreme court of Georgia, that court held, that the practice followed by the court below in that case, of leaving to the jury this question of whether the deceased was in a proper mental attitude toward the fact of death, to enable him to make an admissible declaration, was proper.

The court makes no investigation of the question, and cites no authority, except that of the trial court, whose reputation for careful investigation and learning seems to have been sufficient guaranty for the correctness of the practice. Its conclusion is pronounced in these words:—

"A *prima facie* case of moral consciousness required, should be exhibited to the court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received, and left for the jury to determine whether the deceased was really under the apprehension of death when the declarations were made."

This case of *Campbell* has furnished the foundation for a quite consistent practice in Georgia from that day to the present time allowing the jury to pass upon the question of admissibility. Later cases are cited in the note.[2] In *Bush* v. *State*, the proper practice is said to be:—

"That this character of evidence cannot be admitted until the presiding judge is satisfied, from the preliminary examination, that the requirements of the statute, [declaratory of the common law as to the essentials of an admissible dying declaration] have *prima facie* been met. If they have, the evidence goes to the jury, primarily for their determination whether the declarations were made, and if so, were they made at a time and under such circumstances as to make them evidence. The jury are at liberty to weigh all the circumstances under which the declarations were made including those already proved to the judge. . . . . If they should be of the opinion that he [declarant] was in the article of death when they [the declarations] were made, but not conscious of his condition, then notwithstanding their admission they should reject the evidence as dying declarations."

From about the middle of the last century it is quite clearly apparent, that the courts are diverging upon the question of the right of the jury to revise the finding of the judge as to whether the declarations were made under such circumstances as that they should be considered as evidence; some courts holding that the

[1] 11 Ga. 353, (1852).

[2] Dumas *v.* State, 62 Ga. 58 (1878); Mitchell *v.* State, 71 Ga. 128, (1883); Varendoe *v.* State 75 Ga. 181, (1885); and Bush *v.* State, 109 Ga. 120, 34 S. E. 298, (1899).

jury must be permitted to do so, and others that the finding of the trial court upon facts submitted upon the question of admissibility is conclusive upon the jury. It is proposed now in a brief way to indicate how the courts are marshalled in this country on the question. And first will be noted the courts which give the question to the jury for its final determination.

The supreme court of Massachusetts has adopted the practice of *Woodcock's case* and permits the jury to determine whether declarations admitted as dying declarations by the court upon the preliminary showing, are proper to be considered by them. In *Commonwealth* v. *Bishop* [1] it is said:—

"It is not argued that the defendant had a right to have the jury revise the finding of the judge. There is no doubt that the proper course is for the judge to pass upon the fact in the first instance. If the evidence is let in, our practice allows the party objecting to the evidence, who generally is the accused, to reargue to the jury the preliminary question, as well as the truth of the declaration. But the whole purpose of the preliminary action of the judge would be lost if in all cases the evidence had to be laid before the jury so as to give them the last word. If the evidence is excluded that is the end of the matter unless some question of law is reserved."

In *Commonwealth* v. *Brewer*[2] it was argued that it was wrong to permit the jury to revise the judge's finding. The court answers that the practice is correct and settled, and announces the general rule, applicable in other classes of cases as well, that—

"When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance and then,if he admits the evidence,to instruct the jury to exclude it if they should be of a different opinion on the preliminary matter."

The proposition in *Bishop's case* is laid down upon the authority of *Commonwealth* v. *Preece*,[3] *Commonwealth* v. *Robinson*,[4] and *Commonwealth* v. *Brewer*.[5] *Preece's* and *Robinson's* cases were cases involving the question of the voluntary character of confessions of the accused, in which the same principle is involved. The opinion in *Robinson's* case is very satisfactory from the point of view of those who contend that all questions of fact should go to the jury. This principle has become firmly established in Massachusetts as applicable not only in cases of dying declarations, but in all other cases where similar questions arise. Other cases may be found

[1] 165 Mass. 148, 42 N. E. 560, (1896).
[2] 164 Mass. 577, 42 N. E. 92, (1895).
[3] 140 Mass. 276, 5 N. E. 494, (1885).
[4] 146 Mass. 571, 16 N. E. 452, (1888).
[5] 164 Mass. 577, 42 N. E. 92, (1895).

cited in the note[1] which apply the principle, though not all are cases involving the admission of dying declarations.

In Michigan the question seems not to have arisen directly in connection with the admission of dying declarations, but has several times in connection with the admission of confessions, and it is determined that the question should go to the jury. Cases referred to in the note[2] will illustrate the view of the court of this state.

The supreme court of New Jersey in *Donnelly* v. *State*[3] had occasion to pass upon this question and used this language:—

"Having decided that these statements were dying declarations and as such competent evidence, the court in its charge submits the same question to the jury . . . . . The jury were told that in the first place they were to consider whether M., when he made the declarations, was under the belief that he was at the point of death and every hope of this world gone, ... and entirely to reject all declarations which in *their opinion* were not made under such apprehension."

This instruction was held erroneous.

"The credibility of the statement," says the court, "the weight to which it was entitled, was entirely for the jury. They could believe or disbelieve it, but after the court had decided that it was competent testimony the jury were not authorized to reject it as incompetent, any more than they would have been, if the court had decided that the evidence was incompetent, to take it into consideration."

The later cases of *Roesel* v. *State*,[4] and *Bullock* v. *State*[5] adopt the contrary view and, in the language of the court in the *Roesel* case:—

"If there is a conflict of evidence as to whether the confession was, or was not, voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject it if, upon the whole evidence, they were satisfied that it was not the voluntary act of the defendant." Citing *Wilson* v. *United States*,[6] and *Hopt* v. *Utah*[7] and no other cases.

In the *Bullock case* upon the authority of *Roesel* v. *State* the court carries the rule a step farther and declares it to be the *duty* of the trial court, in cases of conflict of evidence, to send this question to the jury. While these two cases are not cases of dying

[1] Com. *v.* Taylor, 5 Cush. 605, Mass. (1850), confession; Com. *v.* Casey, 11 Cush. 417 (1853) dying declaration; Com. *v.* Howe, 9 Gray 110, (1857), confession; Com. *v.* Morrell, 99 Mass. 542, (1868); Com. v. Cuffee, 108 Mass. 285, (1871); Com. *v.* Culver, 126 Mass, 464, (1879); Com. *v.* Smith, 119 Mass. 305, (1876).

[2] People *v.* Barker, 60 Mich. 277, 27 N. W. 539, (1886); People *v.* Swetland, 77 Mich. 53, 43 N. W. 779 (1889); People *v.* Howes, 81 Mich. 396, 45 N. W. 961 (1890).

[3] 26 N. J. L. 463 (1857).

[4] 62 N. J. L. 216, 41 Atl. 408 (1898).

[5] 65 N. J. L. 557, 47 Atl. 62; (1900).

[6] 162 U. S. 613 (1896).

[7] 110 U. S. 574, 584, (1884).

declarations, it is scarcely to be expected that the court would apply a different rule in such a case, even with the precedent of *Donnelly* v. *State*, *supra*.

The supreme court of Ohio in *Burdge* v. *State*,[1] a case involving the admissibility of confessions, has announced the rule adopted in *Woodcock's Case*, as indicating the proper practice and undoubtedly would apply it to a case of dying declarations, as indeed it was subsequently applied in one of the circuit courts of the state.[2]

The Pennsylvania supreme court, in a case not officially reported,[3] approved the judgment in a case where the submission of this question to the jury was complained of as erroneous.

This court in *Hart* v. *Heilner*,[4] a case in which the trial court was called upon to determine the competency of a witness, made the broad declaration of the law that, in all cases growing out of a trial by jury, all questions of fact, when testimony is given which is not clear, must go to the jury.

In *Kehoe's case*,[5] and in *Johnson's case*,[6] the court says these questions "are for the court," or "are for the court in the first instance, and their ruling will be set aside only for manifest error." *Kehoe's case* was one of dying declarations, and *Johnson's* one of confessions.

In view of the circumstances of these last cases, it is not to be readily concluded that the court intended to declare that the court's determination of the question of admissibility was to be treated as final, as against the right of the jury to pass upon the same facts considered by the court. There is quite as much to be said in favor of the construction that the court only intended to indicate that the trial court's conclusion upon such facts would not be disturbed upon review, except for manifest error; that the court of review would not disturb such conclusion merely because it might *think* it wrong, if it were not *manifestly* so.

With the case of *Valkavitch* and that of *Hart* v. *Heilner* in mind, it is to be expected that, with our question before it, this court would at least uphold the practice which allows the jury to pass upon it, if indeed it did not require an instruction to that effect. Other cases in this court are *Commonwealth* v. *Murray*,[7] *Commonwealth* v. *Williams*,[8] and *Commonwealth* v. *Straesser*.[9]

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[1] 53 Ohio St. 512, 42 N. E. 594 (1895).
[2] Marlin *v.* State, 17 Ohio, C. C. 406 (1898).
[3] Volkavitch *v.* Com. (1888), 12 Atl. Rep. 84.
[4] 3 Rawle, 406 (1832).
[5] Kehoe *v.* Com. 85 Pa. St. 127 (1877).
[6] Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280 (1894).
[7] 2 Ash.(Pa.) 41 (1834).
[8] 2 Ash. (Pa.) 69 (1839).
[9] 153 Pa. St. 451, 26 Atl. 17 (1893).

In Texas the supreme court has had occasion many times to pass upon this question in connection with evidence of confessions, and while the earlier rule was against the right of the jury to reject confessions upon their own view of the evidence bearing upon the question of admissibility, the rule as now enforced is to the contrary. *Rains* v. *State*,[1] and *Hamlin* v. *State*,[2] will illustrate the view of this court upon the general principle.

This question was before the supreme court of the United States in *Wilson* v. *United States*,[3] and that court, speaking through Fuller, C. J., made this declaration of the rule as to confessions:—

"When there is a conflict of evidence as to whether a confession is, or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject the confession, if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

The court cites *Commonwealth* v. *Preece*, *People* v. *Howes*, and *Thomas* v. *State*, all of which have been previously referred to, and *Hardy* v. *United States*.[4] In this last case the court phrased the rule as requiring that when a confession is admitted to the jury, it should be:—

"With the instruction that it is their duty to reject it altogether if they should have a reasonable doubt as to its voluntary nature."

The following summary will serve fairly well to give an idea of the extent to which the opposite view, that the jury have not the right to review the conclusion of the court admitting dying declarations, and reject them, is sustained by the courts of this country.

The supreme court of Alabama in *Burton* v. *State*,[5] held with regard to the admissibility of confessions, that,—

"Whether voluntarily made or not, is a question of law, to be determined by the court." That if admitted, "the jury have no authority to reject them as incompetent."

The court, however, goes on to say that,—

"The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue, or are not entitled to any weight, upon the grounds that they were not voluntarily made."

The language in *Goodwin* v. *State*,[6] to the effect that the jury might, though they believe them true, disregard them altogether, if

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[1] 33 Tex. Cr. 294, 26 S. W. 398 (1894).

[2] 39 Tex. Cr. 579, 47 S. W. 656 (1898).

[3] 162 U. S. 613 (1896).

[4] 3 Dist. Col. App. 35.

[5] 107 Ala. 108, 18 So. 284 (1894).

[6] 102 Ala. 87, 15 So. 571 (1893).

of the opinion that they were not voluntary, it was held should have been modified to correspond with the view so announced. No case in Alabama, in which this precise question was before the court in connection with the admissibility of dying declarations, has come under the writer's observation.

The supreme court of Arkansas, in *Campbell* v. *State*,[1] where this specific question was not raised, stated that the question of admissibility was to be determined by the court, and the jury were to determine questions going to the weight of evidence.

In *Dixon* v. *State*,[2] the supreme court of Florida held that whether such declarations were admissible is "exclusively for the court," citing *Hucks' case*. And again in *Lester* v. *State*[3]:—

"It [admissibility of dying declaration,] is a mixed question of law and fact for the court to decide. . . . Should there be conflict in the evidence touching such preliminary test . . . it is the judge's duty to weigh and settle it."

And again in *Holland* v. *State*[4]:—

"It is the duty of the court, without the assistance of the jury, to determine as to the admissibility of confessions in evidence and the duty of the jury to determine the credibility and weight of the confessions when admitted."

In Indiana the trial court permitted the jury to determine the question of whether a confession was voluntary, and an exception to the instruction was sustained as erroneous. It should be said that the court permitted the confession to go to the jury before passing upon the question of competency, but the discussion of the court takes a wider range, and fairly indicates its view as against the right of the jury to review the finding of the court.[5]

In *Starkey* v. *People*,[6] it is held that this question of competency of alleged dying declarations is in the first place to be determined by the court upon a preliminary examination, and if the declarations are admitted, it is for the jury—

"Upon consideration of the whole evidence, including that heard by the court upon the question of competency, and in determining upon the guilt of the accused, to take into consideration the state of mind of the deceased as to his apprehension of death, and finally determine this, and consequently the force of the declaration as any other question of fact under the law as given them by the court."

And such is still the rule in Illinois.

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[1] 38 Ark. 498 (1882).
[2] 13 Fla. 636 (1871).
[3] 37 Fla. 382, 20 So. 232 (1896).
[4] 39 Fla. 178, 22 So. 298 (1897).
[5] Brown *v.* State, 71 Ind. 470 (1880).
[6] 17 Ill. 17 (1854).

The rule as declared in Iowa, may be found in the opinion in *State* v. *Elliott*.[1] As in *Commonwealth* v. *Culver*, and *Brown* v. *State*, cited *ante*, the court declined, upon the preliminary hearing, to hear evidence offered by the defendant to show the declarations inadmissible. The supreme court, in considering the exception to the admission of the declaration, without hearing defendant's evidence, says:—

"The court try the competency of the deceased as the jury does his credibility, and the decision in either case, on a conflict of testimony, must be final,"

and concludes that the trial court should have heard the offered evidence, as essential to the proper discharge of the court's obligation in this respect.

In *Hudson* v. *Commonwealth*,[2] the supreme court of Kentucky, in passing upon the rule of admissibility of confessions, held it to be a question "of law for the court and not for the jury."

The rule in Louisiana may be found stated in the opinion in *State* v. *Trivas*.[3] The court holds it to be a "question of law blended with fact," and that "the solution of the problem is within the exclusive province of the court, and not of the jury." The supreme court of Maryland, in discussing this question of admissibility, after referring to the cases of *Woodcock*, *John*, *Welbourn*, *Hucks*, and *Bartlett* v. *Smith*, concludes:—

"As very well said in Starkie's note to Hucks' case, it is clearly inconsistent with principle to leave such evidence to the jury to be acted upon or rejected, according to their decision of that which is clearly matter of law."[4]

And in another portion of the opinion it is said:—

"There is the strongest reason against submitting the question to the jury. The very design of requiring the state to show that the confession was voluntary, is to keep it from the jury, unless proved to be free from inducement of any kind."

The rule in Minnesota may be found in *State* v. *Staley*:[5]—

"It is proper for a jury to consider the circumstances under which a confession is made, with a view of determining what weight should be given to it; but it is not their province to reject a confession."

The cases in Mississippi involving the principles being here discussed are also cases involving the admission of confessions. In

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[1] 45 Iowa 486 (1877).

[2] 2 Duval (Ky.) 531 1866.

[3] 32 La. Ann. 1086 (1880).

[4] Nicholson *v.* State, 38 Ind. 140 (1873).

[5] 14 Minn. 105 (1869); See also State *v.* Holden, 42 Minn. 350

Garrard v. *State*,[1] the question of whether the confession was voluntary was left to the jury, and the instruction upheld. This conclusion was expressly overruled in *Ellis* v. *State*,[2] and this last was followed by *Williams* v. *State*[3] in which it is said:—

"The distinction between disregarding evidence and disbelieving it is a refined one, but it necessarily inheres in the trial of cases under a system in which, as with us, the competency of evidence is to be determined by the court and its credibility by the jury. If, because of the circumstances of a confession the jury does not believe it to be true, it ought not to rest a verdict of conviction thereon merely because the court had admitted it; but the evidence cannot be disregarded by the jury—cannot be excluded and not at all considered. The jury must consider all evidence submitted by the court for the purpose of determining its credibility, its weight and effect."[4]

The defendant requested the court in *State* v. *Burns*[5] to instruct the jury that if they did not believe that the declarations were made under such circumstances (defining them) as to make them competent evidence they should disregard them. This request was refused and in considering the exception to such refusal, the supreme court of Missouri says:—

"This instruction was very properly refused for it left it to the jury to pass upon the admissibility of the declaration, a question solely for the consideration of the court and not for the jury."

This case is followed by *State* v. *Simon*,[6] and *State* v. *Johnson*.[7]

In *Shepherd* v. *State*[8] the treatment of this question by the supreme court of Nebraska is not as clear as in some cases. The case is one involving confessions. The question of the preliminary examination, whether it should be held in the presence of the jury, was being considered, and after saying that questions of admissibility were for the court, and of credibility and weight for the jury, the opinion goes on:—

"The importance of the jury hearing the preliminary examination . . . is obvious. The ruling of the court that they were so made, [voluntarily] being only *prima facie*, the jury must ultimately pass upon the question, and in determining the weight to be given to confessions when introduced, the jury may properly consider all the facts and circumstances surrounding their making;"

citing *Holsenbake* v. *State*,[9] *Mose* v. *State*,[10] and *Rice* v. *State*,[11] none of which go so far as to indicate that the jury may reject evi-

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[1] 50 Miss. 147 (1874). [2] 65 Miss. 44, 3 So. 188 (1887). [3] 72 Miss. 117, 16 So. 296 (1894

[4] See also Owens *v.* State, 59 Miss. 547, a case of a dying declaration but not so fully considered upon principle.

[5] 33 Mo. 483 (1863). [6] 50 Mo. 370 (1872).

[7] 118 Mo. 491, 24 S. W. 229 (1893). [8] 31 Neb. 389, 47 N. W. 1118 (1891).

[9] 45 Ga. 43. [10] 36 Ala. 211. [11] 47 Ala. 38.

dence admitted by the court. I conclude therefore, that the court would not like its opinion to be so construed.

The supreme court of New Hampshire,[1] in discussing this question of admissibility with reference to confessions says:—

"Whether the confession of the prisoner was voluntary or not is purely a question of fact: as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown so as to allow the introduction of secondary evidence of its contents. In this and the like cases the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury."

The cases in which it may be proper to submit the question to the jury are not defined.

In New York the court of appeals has declared that—

"Whether the conditions and circumstances under which an *ante mortem* statement was made constitute a sufficient foundation for its reception in evidence, is a question which the trial judge must determine. That is an issue with which the jury have nothing to do, and the court upon the facts addressed to it must try and decide it."[2]

Another case is *People* v. *Smith*.[3]

This declaration in the *Kraft* case should be construed with *People* v. *Cassidy*[4] in mind. In this case the court of appeals without discussion or comment of its own adopts the judgment and opinion of the supreme court which contains this paragraph:—

"The jurors were instructed to disregard the confession if thus obtained [under influence of fear] and they must have found that they were not thus induced; that they were voluntarily made and reliable and hence they were properly in the case."

In *State* v. *Andrews*[5] in which the question of the voluntary character of a confession was left to the jury, the supreme court of North Carolina says:—

"It was error for his Honor to pass this question by without a direct decision, and put on the jury the responsibility of deciding it upon evidence which was not offered to them, but to the court. The jury is sworn and empaneled to try the issue joined between the state and the prisoner at the bar, and not sworn and empaneled to try collateral matters preliminary to the admission of evidence."

The rule in Oregon is as well stated in *State* v. *Foot You*,[6] as in

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[1] State *v.* Squires, 48 N. H. 364 (1869).

[2] People *v.* Kraft, 148 N. Y. 631, 43 N. E. 80 (1896).

[3] 104 N. Y. 491, 10 N. E. 873 (1887).

[4] 133 N. Y. 612, 30 N. E. 1003 (1892).

[5] Phil. 205 (N. C.) (1867).

[6] 24 Oregon 61, 32 Pac. 1031; 33 Pac. 537 (1893).

any other case. *State* v. *Shaffer*[1] is another involving the same question. In the first case the court says:—

"The competency of dying declarations is a matter for the court to determine, but after they have been admitted their weight and credibility become questions of fact for the jury."

In *State* v. *Dalton*[2], without having the question of the right of the jury to revise the finding of the court upon the question of admissibility directly presented, the court took occasion to say that—

"It was only necessary to show to the satisfaction of the *court* in the first instance that it was made under a sense of impending death." . . . . .
"After the evidence is admitted, however, its credibility is entirely for the jury who are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the court and to give the testimony only such credit as upon the whole they may think it deserves."

The supreme court of South Carolina in *State* v. *Banister*[3] made the following declaration of the law:—

"The circuit judge must necessarily determine in the first instance th questions of fact, whether the deceased was *in extremis*, and whether he had lost all hope of recovery at the time the declarations were made . . . . . but after they are properly admitted as competent it is for the jury to pass upon their credibility, and in considering such question they may consider the questions of fact—whether the deceased was *in extremis* and whether he had lost all hope of recovery."

In *State* v. *Cain*[4] exception was taken to the hearing of evidence on the preliminary issue of admissibility, in the presence of the jury. The declarations were excluded by the court and the jury were instructed that the evidence was for the court and not for them. The reviewing court in discussing this exception says:—

"All the authorities agree, that whether such declarations are admissible is a question for the court alone."

The last case to which I shall call attention is that of *State* v. *Reed*.[5] In the trial of Reed before the jury the court in specific language took from the jury all consideration of the question as to whether the declaration was made when the declarant thought death imminent and after he had abandoned all hope of recovery. The supreme court in considering this action of the trial court, after saying, in the language of Mr. Greenleaf, that the question of admissibility was exclusively for the consideration of the court, still using Mr. Greenleaf's language, adds:—

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[1] 23 Oregon 555, 32 Pac. 545 (1893).
[2] 20 R. I. 114, 37 Atl. 673 (1897).
[3] 35 S. C. 290, 14 S. E. 678 (1892).
[4] 20 W. Va. 679 (1882).
[5] 53 Kan. 767, 37 Pac. 174 (1894).

"But after it is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declaration was made, including those already proved to the judge, and to give the testimony only such credit, as upon the whole, they think it deserves. . . . . In passing upon the credibility of the statement the jury are entitled to consider whether as a matter of fact the deceased had lost all hope of recovery and the instruction should have been modified in accordance with this view."

The text writers are not at variance in any substantial particular in their understanding and statement of the rule. ROSCOE ON CRIMINAL EVIDENCE[1] disposes of it in the terse language quoted in the earlier part of this paper. In RUSSELL ON CRIMES this is the declaration of the rule:—

"All the judges agreed at a conference in Easter Term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence. And such has been the uniform practice in all recent cases."[2]

TAYLOR says:—

"If a dying declaration be tendered the judge alone decides whether it has been satisfactorily proved that the deceased believed when he made it that he was on the point of death."[3]

From the discussion of this question in PHILLIPS ON EVIDENCE[4] is the following:—

"The question whether a dying declaration is admissible in evidence is a question exclusively for the consideration of the judge, upon the principle that the question whether any particular piece of evidence be admissible is always to be determined by the judge."

Referring to the view of some, that since the solution of this question depended so largely upon the investigation of facts, it was much more within the ordinary province of juries than judges, it is suggested in answer, that such a practice would most commonly result in their admission, from the very nature of the circumstances, and adds that the [Sympathy of the judge] "is engaged for the attainment of truth, and the equal administration of justice."

The question is therefore more likely to be well and truly decided by the judge than by the jury. In answer to the argument that it is often a heavy responsibility, if not at times a very painful one, he says:—

"But that very feeling is favorable to a right decision and may be used as an argument for the soundness of the existing rule."

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[1] Roscoe Crim. Ev. 61, ed. 8, Am.

[2] Russell on Crimes 760, ed. 6, Am.

[3] Taylor's Evidence, 23 a, (ed. 1897).

[4] Phillips Ev, 297-9, (ed. 4, Am.)

Mr. STARKIE does not discuss the question of admissibility but states:—

"In general, although it is for the court to decide upon the admissibility of the evidence, it is for the jury, under the circumstances, to judge of the effect of it."[1]

Mr. RICE in his Criminal Evidence, while in accord with the rule that the question of admissibility is for the court says, that that is a "humane practice" which in case of conflict in the evidence instructs the jury that they may consider all the evidence and exclude the declaration if satisfied that it was not voluntary[2]. Mr. GILLETT understands that the question is not for the jury and so states the rule.[3] Mr. GREENLEAF has already been referred to in the quotation from the opinion in *Reed's Case, ante.* His view is expressed in § 160 of the first volume of his great work on the Law of Evidence.

Sir WILLIAM DAVID EVANS, in his appendix to his English translation of Pothier on Obligations, in discussing the decision of the judges in 1790, argues for the submission of this question to the jury, adding that:—

"My motive is a superior respect to the fundamental principle of law, that questions of fact are exclusively the province of the jury."[4]

The limitations set for this article will not admit, if it were desirable, (which is more than questionable) of a discussion of the several views of the courts and text-writers to which reference has been made. But a brief discussion of the various phases of this question shown in the types presented, in some general way, with a view to the development of what might be styled a "composite," from the varying forms of expression, may not be wholly unprofitable.

One can scarcely rid himself of the belief, on examining this question from the reported cases, that the line of cases which seems to furnish at least color for the claim that the jury may revise the finding of the court upon questions of admissibility dependent upon the determination of questions of fact, grow out of the conception that all questions of fact *are properly* sent to the jury, if not that all such questions *must* go to the jury, if a jury is sitting.

The maxim "*ad quaestionem facti non respondent judices, ad quaestionem legis non respondent juratores*" should never be interpreted as requiring all questions of fact to be submitted to the jury. As so

[1] 2 Starkie Ev. 460, (Metcalf's ed. 1826.)

[2] Rice Cr. Ev. § 308.

[3] Gillett, Indirect Ev. § 120

[4] 2 Pothier on Obligations, 294, (Evan's ed. 1806.)

clearly pointed out by the late Professor Thayer in his scholarly discussion of the meaning of these terms, "law and fact," as used in the law "Courts existed before juries; juries came in to perform only their own special office, and the courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact."

And again, in speaking of the maxim referred to, he says:—

"It is limited to questions with which the jury has to do; it relates only to *issues* of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial; and so of many of those which present themselves during the trial. The maxim has nothing to do with matters of evidence, but only with a limited class of questions of fact; namely, questions raised by the pleadings, questions of ultimate fact."[1]

The pages following those referred to are rich with learning upon this not well understood and troublesome question. I have said that as one studies the cases favoring the final determination of this question of admissibility by the jury, the thought is continually suggested that the view of the courts is, that because it involves the settlement of a question or questions of fact, therefore it should go to the jury; a conclusion which does not follow of necessity at all under our system of trials; so is it quite apparent too, from such study, that there is in the legal conception of these courts, the idea, that, after all that may be said, the judge presiding is to separate the wheat from the chaff, to determine what is and what is not evidence in a particular case from which the facts disputed, as shown by the formal contentions of the parties as stated in their pleadings, are to be established, through the consideration of the jury, and being established determine the judgment when the law is applied. These two conceptions are quite evidently at war with one another; both cannot stand. Either we must say, when it is a question of whether a particular piece of evidence is proper to be considered in the determination of a dispute, that the presiding officer of the court, —"the court," as is almost the universal speech (and this in itself is significant of his authority)—that the presiding officer of the court shall determine whether this evidence is a suitable means to the end sought, or we must say that the jury themselves shall determine whether the particular evidence challenged is suitable for their consideration.

[1] Thayer's Preliminary Treatise on Evidence at the Common Law, 181-187.

One needs not to have been long dealing with juries to have discovered, not infrequently to his own sincere regret, and at the expense of his client, that an interesting bit of testimony once lodged in the minds of jurors is never dislodged until long after his client has obeyed the final mandate of the court in that case, and has paid its charges with property or life. An *alleged* dying declaration once recited in the presence of a jury, is a *real* dying declaration so far as its practical influence is concerned.

Is it said that it is only in doubtful cases that such questions are to be sent to the jury, or better still, only when the court is satisfied that the declarations are proper evidence, that the jury will get the opportunity to decide the question? It is answered, first, that this is not the common view of many of the authorities cited for this right. Many only require a "*prima facie*" showing to be made; others limit the showing to that of the party offering the declarations, and permit a full investigation only after the declarations are before the jury. And it is answered, secondly, that it is meretricious practice to have it understood that under any circumstances the jury dominates the judge in any field it is at all proper for him to enter. It will be worth a trifle, at least, to the dignity of judicial administration, if it can be distinctly understood that the pronounced determination of the court is final for that trial, unless recalled by the court itself. It is said that this is to thrust upon the court what is oftentimes a painful task. Such cannot be escaped in the judicial office. No good judge ever gloated over the opportunity to carve out half a young man's life by sending him to the prison of the state, but he does it in the discharge of his duty toward the man and the state. So ought the good judge always, and so does he, assume and discharge the duties, and all of them, put upon him by the laws of the state whose servant he is. The state is little honored by that bearer of its judicial authority whose constant endeavor it is to escape responsibility.

Again, if such is the law, how did it become such? Is it common law, and if so, what are the evidences that it is? Certainly the first judge who made a suggestion to that effect was promptly informed by "all the judges" that he was mistaken, and from that time forth, no judge of the English courts seems to have had the temerity to assert to the contrary.

In this country there seemed to be no authority, until about the middle of the last century, among either the courts or students of the law of evidence, for such a proposition as being the rule of the

common law. Is it not a development of the courts, influenced to some extent by the fact that it afforded a way of escape from undesirable responsibility, and that it also afforded a means for the correction of a possible error in the decision of the judge, and with too little thought of the injury which might be done when the bench understands that in case of doubt he can solve it with an instruction to the jury.

Were we asked to state the rule upon weight of authority, it is impossible to do it with the conditions prevailing in this country. With the great courts of Massachusetts, Georgia, Michigan, Texas, of the District of Columbia and the supreme court of the United States, standing squarely for the rule that the jury should be instructed that it is their province to reject evidence admitted by the court, if they differ from the court as to its admissibility; and several other courts of authority standing for the same rule, but with less definiteness; with quite a number of the courts of last resort in the several states silent as yet upon the proposition, it cannot be told where is the weight of authority. If one were asked what, upon principle, ought to be the rule, he might have an opinion. The writer's has been sufficiently shadowed forth in what has already been said.

Were one asked whether, in view of the conditions now existing, there is any common ground upon which, with the passing years, it might be hoped the courts with substantial unanimity might stand, it must be answered that this is not a legal question, though its answer by one competent to speak might be helpful and the question therefore be said to have its practical side.

Those authorities which, while requiring all the circumstances bearing upon the question of admissibility to go to the jury, yet limit the consideration of such facts by the jury to the determination of weight or credibility, seem to the writer to lay down a rule which accomplishes every desirable purpose and to be in entire accord with well established principles.[1]

Such a rule makes impressive the obligation of the court, and he cannot look upon his duty to discharge, as in any sense a merely perfunctory one. It surrenders no element of the dignity of the judicial office of which we in this country are none too careful; and it gives all opportunity to the jury to weigh and determine the credibility of the evidence submitted.

[1] State *v.* Bannister, 35 S. C. 290; 14 S. E. 678 (1892); Burton *v.* State, 107 Ala. 108; 18 So. 284 (1895); State *v.* Staley, 14 Minn. 105 (1869); State *v.* Sullivan & Dalton, 20 R. I. 114; 37 A. 673 (1897); Williams *v.* State, 72 Miss. 117; 16 So. 296 (1894.)

Under such a rule the fact of mental attitude toward approaching death, as well as all the other circumstances surrounding the making of the dying declaration would be proper for the consideration of the jury. A jury might very well conclude that the declarations in one case were entitled to less weight by reason of the fact that the evidence in that case was less convincing than in another, upon the fact of consciousness of approaching death, though in both cases it was sufficient to justify its consideration by the jury.

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